Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs	)	WC Docket No. 18-89

COMMENTS OF HUAWEI TECHNOLOGIES CO., LTD. AND HUAWEI TECHNOLOGIES USA, INC.

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SUMMARY

The Commission has requested comments on the effect, if any, of section 889 of the National Defense Authorization Act for Fiscal Year 2019 on the above-captioned proposed rulemaking. For several reasons, the enactment of this statute provides no authority for the Commission to adopt its proposal, and indeed provides salient reasons why it should abandon this proceeding.

Section 889 by its terms only applies to Federal executive agencies, Federal contractors, and recipients of Federal "loan or grant" funds. It does not apply to recipients of subsidies, such as Universal Service support. Indeed, section 889(b) expressly distinguishes between loans and grants (which are mentioned in paragraph (1)) and subsidies (which are mentioned only in paragraph (2)), precluding any possible interpretation of those terms as synonymous. The Commission has repeatedly referred to the Universal Service Fund as a subsidy program, never as a grant; and this terminology is consistent with the nature of the program, which provides ongoing long-term support for operating costs, not one-time project support as is typical of grants. For similar reasons, the Telecommunications Relay Service is also a subsidy fund, and therefore is not subject to section 889.

Section 889 provides no substantive support for the Commission's proposal to bar the use of any Universal Service support to purchase any equipment from Huawei (even assuming the statute applies to the Universal Service Fund at all), since the provisions of section 889 are considerably different in scope from the Commission's proposal. The Commission's proposal, unlike section 889, is not limited to "telecommunications equipment," nor does it take into account whether the equipment in question is a "substantial or essential component" or "critical technology[.]" The Commission's proposal also provides no exemption for third-party services or for

passive equipment that cannot route or redirect user data. In short, the Commission's proposal would be outside the scope of section 889 even if that law were applicable. If anything, the enactment of section 889 confirms that the Commission's original proposed rule was both outside the scope of its legal authority and irrationally broad.

It would be inappropriate for the Commission to take any action based on section 889, in any event, before that section has been interpreted and implemented by the agencies most directly responsible for its execution, namely the General Services Administration, Department of Defense, and National Aeronautics and Space Administration as administrators of the Federal Acquisition Regulations. Further, reliance on this statute would violate the Administrative Procedure Act, both because the Commission did not (and still has not) given public notice of any specific proposed rule based upon section 889, and because doing so would not be a logical outgrowth of the proposal published in the Notice of Proposed Rulemaking.

Even if the Commission did not explicitly rely on section 889 as a basis for its rulemaking, it would still be unlawful to adopt a rule that assumed a company to be a "threat to national security" and to blacklist it from dealing with recipients of Universal Service support because that company is named in section 889. To do so would be arbitrary and capricious because it would apply the statute outside of its express terms, and would be an unconstitutional denial of procedural due process.

Accordingly, and for the reasons stated in Huawei's previous comments, the Commission should terminate this proceeding and decline to adopt the proposed rule.

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COMMENTS OF HUAWEI TECHNOLOGIES CO., LTD.
AND
HUAWEI TECHNOLOGIES USA, INC.

Huawei Technologies Co., Ltd., and Huawei Technologies USA, Inc. (collectively, "Huawei"), by their undersigned counsel, submit these comments in response to the Public Notice issued by the Wireline Competition Bureau on October 26, 2018 (DA 18-1099), seeking comment on the applicability of section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("2019 NDAA") to the above-captioned proceeding and to programs the Commission oversees.

I. INTRODUCTION

Huawei, a global leader in information and communications technology ("ICT") products and services, has actively participated in this rulemaking proceeding to urge the Commission to abandon its flawed proposal to "blacklist" a handful of specific manufacturers from supplying equipment to recipients of Universal Service Fund ("USF") support. Huawei's initial and reply comments in this docket showed that the Commission's proposed rule exceeds the statutory authority granted to the Commission; is arbitrary and capricious; will cause costs far in excess of any slight benefits; violates constitutional and statutory procedural requirements; and relies on unverified and unsupportable factual allegations.

Despite the lack of any specific evidence that Huawei poses any threat to U.S. national security, and despite the strong circumstantial evidence demonstrating that no such threat exists, as discussed in detail in Huawei's previous comments, Congress chose to name Huawei in section 889 of the 2019 NDAA as one of a small number of companies from which Federal executive agencies and their contractors are prohibited from procuring certain types of equipment. In light of this enactment, the Public Notice poses a series of questions, which appear to fall into four broad categories: (1) whether section 889(b)(1) constitutes an additional legal basis for the Commission's proposed rule, (2) whether section 889's listing of companies can serve as a legal basis for the blacklisting of companies under the proposed rule, (3) whether there are other Commission funding programs covered by section 889(b)(1), and (4) how to interpret section 889(b)(3) insofar as it exempts certain equipment. Public Notice at 2.

As explained below, section 889(b)(1) cannot serve as a statutory basis for the proposed rule. Section 889 by its terms does not apply to the USF, nor to other Commission subsidy programs such as the Telecommunications Relay Service ("TRS") Fund, as those programs provide neither "loans" nor "grants." Further, the proposed rule published in this docket varies in significant respects from the provisions of section 889, even assuming *arguendo* that it did cover USF, so adoption of the proposed ban on use of USF support to purchase any and all equipment made by Huawei cannot be justified by reliance on section 889. Nor can section 889's listing of companies serve as a basis for blacklisting a company under the proposed rule, since the statute does not address the same issues as the proposed rule. Reliance on the statutory list of companies would both be arbitrary and capricious, and would deny affected companies their Constitutional right to

procedural due process. Accordingly, the Commission should find that section 889 provides no basis for adopting any rule as proposed in this docket.

II. SECTION 889 OF THE 2019 NDAA CANNOT SERVE AS A STATUTORY BASIS FOR THE COMMISSION'S PROPOSED RULE

A. Section 889(b)(1) Does Not Apply to USF Funds.

The restriction contained in section 889(b)(1) cannot serve as a basis for the Commission's proposed rule, because section 889 applies to grants but not subsidies, and USF funds are subsidies rather than grants.

1. Section 889 Applies to Grants, but Not to Subsidies.

Section 889(b)(1) restricts only the obligation or expenditure of "loan or grant funds" on covered telecommunications equipment. The term "loan or grant funds" does not include subsidies.

First, the contrast between section 889(b)(1) and the neighboring provision—section 889(b)(2)—shows that Congress distinguished between grants and subsidies in the 2019 NDAA. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act," "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 583 (D.C. Cir. 1990) ("When Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things") (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 224 (1967)). "The more apparently deliberate the contrast, the stronger the inference." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579 (2006).

Here, section 889(b)(1) restricts only the obligation or expenditure of "loan or grant funds" on covered telecommunications equipment. In sharp contrast, section 889(b)(2) directs agencies to prioritize "loan, grant, *or subsidy* programs" to certain entities affected by the restriction in section 889(b)(1) (emphasis added). Congress' simultaneous enactment of neighboring clauses within the very same statutory section—one referring to loans and grants, but the next referring to loans, grants, and subsidies—shows that Congress deliberately intended that section 889(b)(1) apply to loans and grants alone.

Indeed, the distinction Congress drew makes sense as a practical matter. Section 889(b)(1) imposes restrictions that preclude certain entities (*i.e.*, recipients of loan and grant funds) from purchasing certain equipment. Section 889(b)(2) then directs federal agency heads to use multiple tools at their disposal—loans and grants, as well as subsidies that the agency heads may be "administering"—to help support those entities and to alleviate some of the harms from those restrictions. But the fact that agencies should help out affected entities with subsidies at the agencies' disposal—such as USF support—does not necessarily mean that those subsidies are themselves subject to the prohibition contained in section 889(b)(1). Neither the Commission nor the courts can simply blue-pencil "subsidy programs" or "subsidies" into section 889(b)(1) when it is not present, just as they cannot white out "subsidies" from section 889(b)(2) when it is present.

Second, even apart from any contrast with section 889(b)(1), section 889(b)(2) on its own confirms that Congress treated grants and subsidies as separate legal categories. Where Congress uses two different terms in a statutory provision, courts presume that Congress "intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146

(1995). In section 889(b)(2), Congress referred to "loan, grant, *or subsidy* programs." (Emphasis added.) It follows that Congress intended "grant" to have a different meaning than "subsidy."

Moreover, the inclusion of the term "subsidy" in section 889(b)(2) but not in section 889(b)(1) further shows that Congress deliberately chose not to include subsidies in the prohibitions contained in section 889(b)(1). "A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan*, 548 U.S. at 578. This presumption, of course, must be strongest when Congress uses the words in the very same section of the same statute and is particularly appropriate, where, as here, the second paragraph explicitly references the first such that it would be surprising for the drafters to have forgotten to include the relevant language in both paragraphs. It is especially unlikely for Congress to have made such a mistake here because it was long ago made aware of the Commission's rulemaking in Docket No. 18-89. *See* H.R. Rep. No. 115-676, p. 163 (2018). In any event, such mistakes are for Congress to address through precise drafting (and subsequent legislative amendments) and not for the Commission to remedy through an interpretation unconstrained by the text of the statute.

Moreover, even if section 889(b)(2) did not exist, the plain meaning of the term "grants" would not encompass subsidy programs such as USF support. Generally, grants are understood as monetary awards that are to be used for defined purposes. On the other hand, subsidies refer to direct contributions, tax breaks and other special assistance (including non-monetary assistance) that governments provide businesses to offset operating costs over a period of time. Furthermore, grants (and loans) are more likely to be a one-time disbursement of funds whereas subsidies—like

USF—are more likely to be provided on an ongoing basis to assist in keeping the cost of the subsidized service low. For example, in contrast to one-time grants (and loans) used to support the initial cost for deployment of infrastructure, USF provides support for both operating expenses *and* capital investment over a period of time. For example, unlike the Broadband Initiatives Program and Broadband Technology Opportunities Program, grant programs that expressly prohibited the use of award funds for "operating expenses of the project, including fixed and recurring costs,"[1] the Commission's Mobility Fund Phase II "provide[s] *ongoing support* for provision of service in areas that would lack mobile voice and broadband coverage absent government subsidies" over a period of ten years. *In re Connect Am. Fund et al.,* 32 FCC Rcd 2152, 2157, ¶ 16 (2017) (emphasis added). Similarly, the Alternative Connect America Model ("A-CAM") provides support to rural carriers to cover the "full average monthly cost of operating and maintaining an efficient, modern network" over a 10-year term. *See In re Connect Am. Fund et al.,* 31 FCC Rcd 3087, 3097, 3100 ¶¶ 22, 30 (2016). *See also In re Connect Am. Fund et al.*, 29 FCC Rcd 15644, 15655-56, ¶ 29 (2014) (providing ongoing support for Connect America Fund ("CAF") Phase II recipients "to meet an evolving broadband speed standard over the ten-year term"). Similarly, as modified by the Commission in 2016, the rate-of-return USF program for small, rural carriers provides reimbursements for operating expenses as well as capital investments. *See In re Connect Am. Fund et al.,* 31 FCC Rcd at 3124-3131, ¶¶ 95-115. The Lifeline program also provides on-going monthly subsidies which reduce or cover the monthly cost of telephone and broadband service for low-

[1] *See* Department of Agriculture, Rural Utilities Service, and Department of Commerce, National Telecommunications and Information Administration, Notice of Funds Availability and Solicitation of Applications, 74 F. R. 33104, 33112 (2009).

income consumers. *See* 47 C.F.R. § 54.403(b)(1) (requiring ETCs to waive certain charges and/or otherwise "reduce the cost of any generally available residential service plan or package" for Lifeline customers).

Although the 2019 NDAA does not contain any definition of "grant funds," nor does it define "subsidy," as discussed above, section 889(b)(2)'s separate reference to grants and subsidy programs shows that Congress intended to distinguish between grants and subsidies and that these terms are not interchangeable.

Third, federal law more broadly distinguishes between grants and subsidies. The term "grant" has a narrow, technical meaning in federal law: A grant generally provides a third party the means to accomplish some task that the Government could have done for itself. *See* 31 U.S.C. § 6304 (grants are used "to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government"). In contrast, the term "subsidy" has a broader, non-technical meaning: It means "monetary assistance granted by a government to a person or group in support of an enterprise regarded as being in the public interest." *Blue Calypso, Inc. v. Groupon, Inc.*, 93 F. Supp. 3d 575, 595 (E.D. Tex. 2015) (quoting American Heritage Dictionary 896 (3d ed. 1992)). The primary federal procurement statute expressly provides that the term "grant agreement" "do[es] *not* include an agreement under which … only … a subsidy" "is provided." 31 U.S.C. § 6302(2)(B) (emphasis added). Similarly, the Office of Management and Budget ("OMB") has codified rules implementing the Federal Grant Act, which provide (in 2 C.F.R. § 200.51(c)(2)) that a grant agreement does not include an agreement that provides only a "subsidy." Against this

backdrop, section 889(b)(1)'s reference to grants cannot be interpreted to encompass mere subsidies.

2. USF Funds Are Subsidies, Not Grants.

The USF program is a subsidy program, not a grant program. It fits the definition of a subsidy: It consists of monetary assistance provided by the government to particular groups in support of an enterprise regarded as being in the public interest. *Supra*, p. 7. It does not fit the definition of a grant: It does not provide a third party the means to accomplish a task that the Government could have performed for itself.

Unsurprisingly, therefore, USF support is typically characterized as a subsidy rather than a grant. First, Congress has not characterized USF funds as grants in the Communications Act. USF support was understood to be a system of implicit subsidies among carriers before the passage of the Telecommunications Act of 1996, and the Act's provisions merely serve to codify that system explicitly, not to change the system's fundamental nature. Second, courts reviewing the Commission's USF actions have characterized USF support as subsidies, not grants. *See, e.g.*, *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) ("excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)") (citing *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001)); *Alenco Commc'ns Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000) (concluding that "[t]he methodology governing subsidy disbursements" was predictable because it was "plainly stated and made available to" carriers); *In re FCC 11-161*, 753 F.3d 1015, 1103 (10th Cir. 2014) ("By way of the Order, the FCC explained its reasoning for each of the subsidies and initiatives that it chose to promote

telecommunications access on Tribal lands."). Finally, the Commission itself consistently has referred to USF funds as subsidies. *See, e.g.*, *In re Connect Am. Fund*, 29 FCC Rcd 7051, 7092–93, at ¶¶ 120, 123 (2014) ("federal universal service subsidies"); *In the Matter of Connect Am. Fund*, 26 FCC Rcd 17663 (2011); 47 C.F.R. § 54.5 (defining providers of voice and broadband service that do not receive USF high-cost support as "unsubsidized competitor[s]"). In addition, the Commission has considered the use of USF funding alongside grant and loan funding, which leads to the conclusion that the Commission recognizes the distinction between USF subsidies on the one hand and loans and grants on the other. *See, e.g.*, *In re A Nat'l Broadband Plan for Our Future*, 24 FCC Rcd 4342, 4350 (2009) ("How would speed definitions and other regulations attached to grants, loans and universal service distributions affect affordability and pricing of services?"). Finally, as the Media Bureau's Audio Division has stated, "the Commission does not administer any grant programs"—a statement that would be inexplicable if the USF qualified as a grant program. *See* Letter to Jeffrey D. Southmayd, Esq. from Peter Doyle, Chief, Audio Division, 29 FCC Rcd 107, 109 n.11 (MB 2014).

In stark contrast, Congress has referred to *other* federal programs as grant programs. For example, elsewhere in the Telecommunications Act of 1996, Congress specifically authorized the federal government to assist the National Education Technology Funding Corporation in designating State education technology agencies to "receive loans, grants or other forms of assistance" and "provide loans, grants and other forms of assistance" to such agencies. *See* Pub. L. No. 104–104, 110 Stat. 56, § 708(a)(1)(C)(ii), (iv), (c)(1). Similarly, Congress has appropriated money for "grants" under the Broadband Initiatives Program overseen by the U.S. Department of Agriculture's Rural Utilities Service ("RUS"). American Recovery and Reinvestment Act of 2009, Pub.

L. No. 111-5, 123 Stat. 115, 118 (2009). Numerous other examples abound. *See, e.g.*, 34 U.S.C. § 10108(c) ("In this section, the term 'DOJ grant funds' means, for a fiscal year, amounts appropriated for activities of the Department of Justice in carrying out grant programs for that fiscal year."); 42 U.S.C. § 5106a(f)(1)(B) ("The term 'grant funds' means the amount appropriated under section 5106h of this title for a fiscal year and not reserved under section 5106h(a)(2) of this title."); 12 U.S.C. § 4719(b)(1) ("The Fund shall make grants to community development financial institutions …"); 34 U.S.C. § 10479(c) ("A State, unit of local government, territory, Indian Tribe, or nonprofit agency that receives a grant under this section shall, in accordance with subsection (b)(2), use grant funds for the expenses of a treatment program …."); 34 U.S.C. § 10651(h)(1) ("The Attorney General is authorized to make grants under this section to States, units of local government, Indian tribes, and tribal organizations for the following purposes …"); 42 U.S.C. § 1397m(b)(2) ("Funds provided under grants under this subsection may be used for any of the following …"); 47 U.S.C. § 1305 ("grants" and "grant funds" under the Broadband Technology Opportunities Program"). That Congress referred to all of these other funds as grants, but did not refer to USF support as a grant, confirms that USF support is indeed not a grant, but is rather a subsidy. Unsurprisingly, Grants.gov, the website maintained by OMB housing over 1,000 grant programs as a centralized location for grant seekers to find and apply for federal funding opportunities, does not list USF.

Section 889 was enacted against this legal and historical backdrop, and it thus cannot reasonably be understood to treat USF funds as grants. Accordingly, USF cannot be subject to the provisions of section 889(b)(1).

3. Section 889 Does Not Apply to the TRS Fund.

Similar to USF support discussed in Section II.A above, the Commission has recognized the Telecommunications Relay Services ("TRS") Fund as providing a subsidy for certain services, not a grant. Specifically, when denying Sorenson Communications, Inc.'s motion for stay of the interim rates for Video Relay Service ("VRS"), the Consumer and Governmental Affairs Bureau ("CGB") referred to USF as "another, unrelated, subsidy mechanism," thereby recognizing that TRS support, like USF, is a subsidy. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order Denying Stay Motion, CG Docket No. 03-123, 25 FCC Rcd 9115, 9122, ¶ 22 (CGB 2010). Similarly, the Commission has expressly referred to TRS as a "federally subsidized" service. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, CG Docket No. 03-123, 23 FCC Rcd 8993, 8998, ¶ 11 (2008) (stating that "it is reasonable to restrict the use of customer information acquired in the provision of federally subsidized TRS services."). Like USF, TRS is not included by Grants.gov in its centralized list of federal grant opportunities. Furthermore, the Commission has never referred to the TRS Fund as a grant program. Because the TRS Fund is a subsidy program—and not a grant program—it is not affected by section 889 for the same reasons as USF funds discussed above.

B. The Restrictions Imposed by Section 889 Are Significantly Different from the Restrictions Imposed by the Proposed Rule.

Even if USF funds were considered "grants," section 889(b)(1) would not authorize the Commission to issue the proposed rule, because the statute's restrictions are substantially different and oftentimes narrower than the restrictions proposed in the Notice of Proposed Rulemaking

("NPRM"). In particular, the proposed rule applies to more and different equipment than section 889(b)(1). It also imposes more onerous burdens than section 889(b)(1).

1. The Proposed Rule Applies to More Equipment than Section 889(b)(1).

Section 889(b)(1) applies only with respect to "covered telecommunications equipment and services," a term defined to include "telecommunications equipment" and "telecommunications … services" produced by Huawei, subject to certain exemptions. Section 889(f)(3)(A), (C). Even the broad definitions of "telecommunications equipment" and "telecommunications service" in the Telecommunications Act of 1996 clearly do not encompass *all* equipment or services produced or provided by a company. 47 U.S.C. § 153(50), (51). The proposed rule, by contrast, would preclude the use of USF funds to "purchase or obtain any equipment or services produced or provided by any company posing a national security threat." NPRM, ¶ 13. Thus, the proposed rule applies to products and services irrespective of whether the product or service is "telecommunications equipment" or a "telecommunications service" within the meaning of the 2019 NDAA.

Section 889 also does not apply to *all* telecommunications equipment or services. For example, section 889(b)(1) also applies only with respect to the use of covered telecommunications equipment or services "as a substantial or essential component" or "as critical technology." No analogous requirement exists in the proposed rule. In addition, section 889 exempts the procurement of "a service that connects to the facility of a third-party, such as backhaul, roaming, or interconnection arrangements," as well as the procurement of "telecommunications equipment that cannot route or redirect user data or traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles." Section 889(a)(2)(B), (b)(3)(B). This exemption

encompasses a significant subset of telecommunications equipment, such as passive equipment like antennas and wires. The proposed rule includes no comparable exemptions and, resultantly, imposes broader restrictions than section 889 in yet another manner.

2. The Proposed Rule Would Impose a More Onerous Burden than Section 889.

As Huawei has noted in its previous comments, the proposed rule will result in substantial and concrete injury to companies who have relied upon certain telecommunications equipment providers for the costly implementation of their infrastructure. *See, e.g.*, Comments of Huawei Technologies Co., Ltd and Huawei Technologies USA, Inc., WC Docket No. 18-89 (filed June 1, 2018) at 54-57; Reply Comments of Huawei Technologies Co., Ltd and Huawei Technologies USA, Inc., WC Docket No. 18-89 (filed July 2, 2018) at 54-57. These burdens are more onerous than those imposed by section 889. For example, while section 889(b)(2) does not take effect for two years, the proposed rule would take effect sooner—increasing the burden on affected parties such as rural providers who would need to replace a significant amount of equipment in a shorter span of time. Furthermore, while section 889 ultimately does not prevent this injury, section 889(b)(2) does require heads of executive agencies, specifically "including the heads of the Federal Communications Commission," to "prioritize available funding and technical support to assist businesses, institutions and organizations" during the "transition from covered communications equipment and services." The proposed rule makes no effort to provide any such assistance.

C. Section 889 Confirms that the Proposed Rule is Unlawful.

"It is, of course, the most rudimentary rule of statutory construction … that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion). Indeed, "[the] classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1988).

Section 889 of the 2019 NDAA confirms that the previously enacted Communications Act does not authorize the Commission to adopt universal-service policies on the basis of supposed national-security concerns. *See* Huawei Opening Comments 12–35. Section 889(f)(3) empowers "the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation," to determine whether a company is "owned or controlled by, or otherwise connected to," the Chinese Government, and thereby to subject the company to the 2019 NDAA's restrictions. Section 889 envisions no role for the Commission, apart from complying with the restrictions imposed by the statute and the Secretary of Defense. Section 889 thus confirms that Congress has assigned the role of addressing supposed national security concerns raised by the global supply chain to other federal agencies, not to the Commission. *See* Huawei Opening Comments 12–13. As a result, far from providing a statutory basis for the proposed rule, section 889 in fact confirms that the proposed rule is unlawful.

Likewise, the fact that Congress determined to restrict the use of particular companies' equipment in some circumstances, but not others (as discussed in Section II.B above), provides

further confirmation that it would be arbitrary and capricious for the Commission to adopt its proposal to prohibit *all* use of USF support to purchase *any* equipment or service produced or provided by a blacklisted company. The Commission's proposal is too indiscriminate and lacking in factual basis to survive judicial review.

D. It Would Be Inappropriate for the Commission to Rely on Section 889 Before Its Interpretation by the General Services Administration, Secretary of Defense, and NASA Administrator.

Section 889(b)(1) has far-reaching impact on government procurement, which is heavily regulated under "a single Government-wide procurement regulation … the Federal Acquisition Regulation," as jointly issued by the General Services Administration ("GSA"), the Secretary of the Department of Defense, and Administrator of the National Aeronautics and Space Administration ("NASA"). 41 U.S.C. § 1303(a)(1). Federal agencies are generally required to follow policies implemented in, and promulgate regulations consistent with, the Federal Acquisition Regulation ("FAR"). *Id*; § 1121(c). This extends to policies related to the procurement of property and services. § 1121(c)(1). The "single" regulation issued by the GSA, Defense Secretary, and NASA is meant to occupy the field of procurement regulation: Congress has prohibited executive agencies from issuing additional "regulations relating to procurement," except where such regulations are "essential to implement Government-wide policies and procedures within the agency" or "required to satisfy the specific and unique needs of the agency." § 1303(a)(2).

In response to legislation such as the 2019 NDAA, the GSA, Defense Secretary, and NASA Administrator periodically amend the FAR to maintain clarity in procurement regulation subject to a notice and comment period. *See, e.g.,* Proposed Rule by the Defense Department, the General Services Administration, and the National Aeronautics and Space Administration, 83 F.R. 28141

(published July 16, 2018) (proposing to amend the FAR to implement a section of the NDAA for Fiscal Year 2017). The GSA, Defense Secretary, and NASA are already in the process of doing so with respect to section 889 of the 2019 NDAA. *See* Office of Management and Budget, RIN 9000-AN83, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=9000-AN83. Thus, it would be improper for the Commission to rely on or seek by regulation to implement section 889 until such time as the GSA, Defense Secretary, and NASA Administrator complete their process of reviewing and amending the FAR to implement section 889. Without this amendment, the Commission cannot ensure that its interpretation of section 889 is valid, as it may not be "consistent with the Federal Acquisition Regulation, 41 U.S.C. § 1303(a)(1), or "essential to implement Government-wide policies" established by the FAR, § 1303(a)(2).

E. Reliance on Section 889 as a Basis for the Commission's Proposed Rule Would Violate the APA's Legal Authority Requirement.

The Administrative Procedure Act ("APA") requires the notice of proposed rulemaking to "include … reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2). It has long been settled that a notice complies with this requirement only if it specifically states "something along the lines of … 'The rule is issued under the authority of [the statutory provisions invoked].'" *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978). A general reference to a statutory provision somewhere in the NPRM is "insufficient." *Id.* *Accord Global Van Lines v. ICC*, 714 F. 2d 1290, 1297-98 (5th Cir. 1983).

The NPRM here was issued before the 2019 NDAA was adopted, and therefore necessarily does not identify that statute as providing legal authority for the proposed rule. Rather, the NPRM states that "sections 201(b) and 254 of the [Communications] Act provide … legal authority for

the rule." NPRM, ¶ 35. Furthermore, as discussed above, the scope of section 889 differs significantly from the scope of the proposed rule, so it would not have been appropriate to cite the 2019 NDAA as providing legal authority even if it had been in force at the time. The Commission therefore would violate the APA by relying on section 889 as the legal authority for its rule.

F. Reliance on Section 889 as a Basis for the Commission's Proposed Rule Would Violate the Logical-Outgrowth Doctrine

A rulemaking complies with the APA's notice-and-comment requirements only if the final rule is "a logical outgrowth" of the notice. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009). "A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.*

A final rule implementing section 889 would not be a logical outgrowth of the NPRM. The NPRM sought comment on a proposal to implement the Communications Act, not the 2019 NDAA. In fact, the 2019 NDAA did not even exist at the time of the NPRM, and would not be enacted until four months after the NPRM. Further, the NPRM did not cite any precursor bill as providing the statutory authority (if enacted) for the Commission's rulemaking. It is unreasonable to expect parties to have divined that Congress would have enacted a new statute months after the issuance of the notice, and that the agency would use this rulemaking as a vehicle for implementing that new statute rather than the Communications Act.

The Public Notice does not cure this problem. "Of course it is true that defects in an original notice may be cured by an adequate later notice," but only if the later notice is, in fact, "adequate." *McLouth Steel Prods. Co. v. Thomas*, 838 F.3d 1317, 1323 (D.C. Cir. 1988). A notice is "inadequate" if the agency fails to specifically identify the "proposed chang[e]" it seeks to make and the legal basis for that change. *Id.* The Public Notice makes reference to the 2019 NDAA and asks questions about it, but it does not actually make a proposal to use this rulemaking to implement the 2019 NDAA. Nor does it propose to adopt any rule that would implement the specific terms of section 889. Parties do not know what, if any, changes the Commission might be considering to the proposed rule based upon the provisions of the 2019 NDAA, and therefore cannot use this round of comments as an opportunity to comment on any such changes. The Commission therefore would violate the APA by adopting rules purporting to implement section 889 without having first provided notice of and an opportunity to comment on such a proposal.

III. SECTION 889'S LISTING OF COMPANIES CANNOT SERVE AS A BASIS FOR BLACKLISTING A COMPANY UNDER THE PROPOSED RULE

Huawei explained in its initial comments that the Commission may not declare a company to be a threat to national security, and bar it from doing business with recipients of USF support, simply because Congress imposed restrictions on that company's products in the 2018 NDAA. *See* Huawei Initial Comments at 81-83. First, treating an existing statute as a substitute for a hearing would deny due process. Second, the Commission cannot rationally rely on such a statute to prohibit transactions that are beyond the scope of the statute itself. Third, it would be arbitrary and

capricious to assume that statutory restrictions on use of a company's equipment in particular situations implies that it would be a "threat" to use that company's equipment in circumstances other than those specified in the statute.

For largely the same reasons, the Commission may not blacklist a company simply because Congress has listed it in section 889(f)(3)(A)–(B) of the 2019 NDAA, or because the Secretary of Defense designates it under section 889(f)(3)(D). Notably, section 889 does not contain an express finding that Huawei (or any other company) poses a "threat to the integrity of communications networks or the communications supply chain," as contemplated by the proposed rule. The Commission cannot rationally base a finding that such a threat exists on the terms of the 2019 NDAA, since the statute does not speak to that question. Indeed, on their respective faces, the proposed rule and section 889(f) ask distinct questions and, accordingly, the Commission has no factual or legal basis for treating them as if they are equivalents. And, in any event, the Commission may not use a statute as an excuse for denying Huawei or other affected companies their Constitutional procedural due process rights.

IV. CONCLUSION

For the foregoing reasons, the enactment of section 889 of the 2019 NDAA does not alter Huawei's previous conclusion that the Commission should terminate this proceeding without adopting any rule.

Respectfully submitted,

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